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sNo. 03-1407

IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

There is no dispute that this case squarely presents the three-way circuit conflict regarding whether and under what circumstances payments from an Individual Retirement Account (IRA) can be exempt from property of the estate under 11 U.S.C. 522(d)(10)(E). The Second, Fifth, Sixth, and Ninth Circuits allow exemption for funds in a standard IRA "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor," 11 U.S.C. 522(d)(10)(E). See Pet. 6-7. Under that rule, the funds in petitioners' IRAs unquestionably would have been eligible for exemption. The Eighth Circuit, however, effectively bars all IRAs from exemption. See Pet. App. 6a. The Third Circuit takes yet another position, allowing exemption for an IRA only when the debtor has reached the age of 59½ at the time he or she files for bankruptcy. See Pet. 9-10.

Respondent has no answer to the petition's showing that the conflict over the question presented profoundly affects the millions of Americans who hold IRAs (see Pet. 12), is frequently litigated (see *id.* at 13-14), and cannot resolve itself absent this Court's intervention (see *id.* at 10-11). Despite the panel's recognition of the circuit split and its further recognition that settled Eighth Circuit precedent was likely erroneous (see Pet. App. 6a), the full court denied rehearing en banc (*id.* at 36a). The Third Circuit's rule has similarly been entrenched for over twenty years. See Pet. 10. Few debtors in bankruptcy have the resources to mount a quixotic challenge to circuit precedent that the courts of appeals appear unwilling to revisit absent further guidance from this Court. Thus, this case presents a rare opportunity for this Court to bring uniformity to this important question of federal law. See *id.* at 11-12.

1. Respondent frankly concedes, as she must, that "[t]he Second, Fifth, Sixth, and Ninth Circuits have held that IRAs are exempt pursuant to 11 U.S.C. § 522(d)(10)(E) or pursuant to state statutes which are materially identical." BIO 5. The

Eighth Circuit, in contrast, holds that no IRA which allows early withdrawal subject to a tax penalty can ever be exempt. Pet. App. 6a (holding that IRA investors' "discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties" disqualifies the plans from Section 522(d) exemption). As the petition demonstrated, that rule apparently encompasses *all* IRAs, because neither petitioners, nor respondent, nor any court has been able to identify an IRA that forbids early withdrawals. See Pet. 8 n.7. Respondent's characterization of the Eighth Circuit rule as calling for "case-by-case" review of individual IRAs (BIO 5) is thus erroneous.

The conflict is broader still because the Third Circuit applies yet another rule, discriminating on the basis of the debtor's age in deciding whether a particular IRA is eligible for exemption. Pet. 9-10; *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21, 23 (CA3 1983). Respondent's unelaborated suggestion that the Third Circuit rule is no longer good law (see BIO 5) ignores the consistent line of bankruptcy court authority in that circuit applying that rule (see Pet. 9-10 (citing, *e.g.*, *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996) ("While I find that * * * the Debtors have a 'right to payment' in the IRA which falls squarely within the provisions of 11 U.S.C. 522(d)(10)(E), * * * I am stifled in that pursuit by a clear and unambiguous decision of the Third Circuit.")).

2. The proper construction of Section 522(d)(10)(E) is unquestionably of sufficient importance to warrant review in this Court. The question presented determines whether the *millions* of Americans whose retirement savings are held in IRAs – a figure that is only growing with time (see Pet. 12) – will be stripped of those savings should they be forced into bankruptcy.

Respondent suggests that any circuit split relating to the exemption scheme of Section 522(d) lacks sufficient importance to merit review because Section 522 permits states to opt out of the federal exemption scheme and some of the

states that have exercised that option do not parrot the language of Section 522(d)(10)(E). See BIO 6. But when the question presented has broad consequences even within a limited number of states, as here, this Court has not hesitated to grant certiorari. See, *e.g.*, *Equal Opportunity Employment Comm'n* v. *Commercial Office Products Co.*, 486 U.S. 107 (1988) (construing the 300-day statute of limitations in Section 706(e) of Title VII of the Civil Rights Act of 1964, which applies only in jurisdictions that have established fair employment agencies); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (determining how a provision of the Railroad Retirement Act, 45 U.S.C. 231m, operates in states with community property statutes); *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) (construing 42 U.S.C. 1988 to incorporate state survivorship laws only when they are consistent with federal law). Indeed, the Court has even reviewed federal *bankruptcy* statutes that apply only in a "single statutorily defined region." *Railroad Rail Reorganization Act Cases*, 419 U.S. 102, 158 (1974) (reviewing on direct appeal the constitutionality of a bankruptcy provision governing the reorganization of railroads in specified northeastern states). See also, *e.g.*, *Owen* v. *Owen*, 500 U.S. 305 (1991) (addressing the interplay between a state's exemptions and 11 U.S.C. 522(f)). And of course, the Court frequently grants certiorari to resolve constitutional questions that arise in only a subset of the states. See, *e.g.*, *Roper* v. *Simmons*, 124 S. Ct. 1171 (2004) (granting certiorari to determine whether executing juvenile offenders violates the Constitution); *Locke* v. *Davey*, 124 S. Ct. 1307 (2004) (upholding the constitutionality of state refusals under Blaine Amendments to fund students who are pursuing theology degrees).

The Constitution moreover contemplates that Congress will establish "uniform" laws on the subject of bankruptcies. U.S. Const. art. I, § 8, cl. 4. Although Congress has permitted states to require residents to use state-generated lists of exemptions that reflect their distinctive commercial and social contexts, see *Railway Labor Executives' Ass'n* v. *Gibbons*,

455 U.S. 457, 469 (1982) (discussing this longstanding policy). Congress did not contemplate the wholesale abandonment of uniformity with respect to exemptions. Disparate interpretations of the federal exemptions bring none of the benefits associated with deference to the states yet exact all of the costs of nonuniformity. And it perversely requires states in the Eighth and Third Circuits that wish to reinforce Congress's express policy of promoting investment in retirement accounts to opt *out* of the federal exemption scheme.

3. Certiorari is also warranted because the decision below is wrong on the merits. With the exception of the Third and Eighth Circuits, every court to have addressed the issue has agreed that IRAs are eligible for exemption under Section 522(d)(10)(E). Pet. 6-7 & n.6. That near uniform line of authority rejecting the holding adopted in this case notably includes not only five courts of appeals but also *every* bankruptcy court in the remaining circuits that has addressed the question. *Id.* The collective wisdom of the nation's bankruptcy judges should not be discounted.

Respondent suggests that the decisions of all of these courts rest purely on "policy considerations." BIO 3. Not so. The rule adopted by the overwhelming majority of courts rests principally upon the text and structure of the Bankruptcy Code. Section 522(d)(10)(E)(iii) explicitly incorporates the Internal Revenue Code provision that defines IRAs; there would be no purpose in doing so if IRAs were categorically excluded, as the Eighth Circuit effectively held. See Pet. 15. Although respondent asserts the contrary, she gives no alternative explanation for why the statute would contain an internal reference to IRAs. In any event, payments under IRAs are indeed triggered by four of the conditions listed in Section 522(d)(10)(E) as sufficient to justify exemption: illness, disability, death, and age. See Pet. 16.

Finally, respondent's suggestion that the availability of tax-penalized early withdrawal before age 59½ renders an IRA nonexempt fails for three reasons. First, the fact that

early withdrawals *are* penalized demonstrates that IRAs are intended to operate as retirement savings devices, just like pensions, annuities, and the other plans listed in Section 522(d)(10)(E). Second, as the petition demonstrated and respondent does not dispute, her reading would implausibly disqualify not only IRAs, but also *all* the other financial instruments explicitly listed in the statute, because all allow for tax-penalized early withdrawal under federal law. Pet. 16-17 (citing 26 U.S.C. 72(t)). Her reading would thus render Section 522(d)(10)(E) nugatory. Third, respondent's reading is unsupported by the text: payments need not *only* be triggered by the listed conditions in order to be "on account of" these provisions but may also be triggered by other events, such as the holder's decision to remove funds at the expense of the tax penalty. See *In re Carmichael*, 100 F.3d 375, 379 (CA5 1996) (noting that the words "only" or "solely" do not appear in the provision, and holding that "the fact that payments can also be triggered by some additional factor * * * cannot destroy exemptibility").

Because this case squarely presents a frequently recurring question that is essential to the orderly operation of the bankruptcy laws, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully Submitted,

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[1] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: David M. Cooper, Eric J. Feigin, and Nicola J. Mrazek. Clinic members Michael P. Abate, William B. Adams, Daniel S. Goldman, and Jennifer J. Thomas also contributed.